

FILED  
APR 7 1924  
WM. R. STANSBURY  
CLERK

IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1923.

---

No. 333 68

---

UNITED STATES

vs.

PENNSYLVANIA RAILROAD COMPANY.

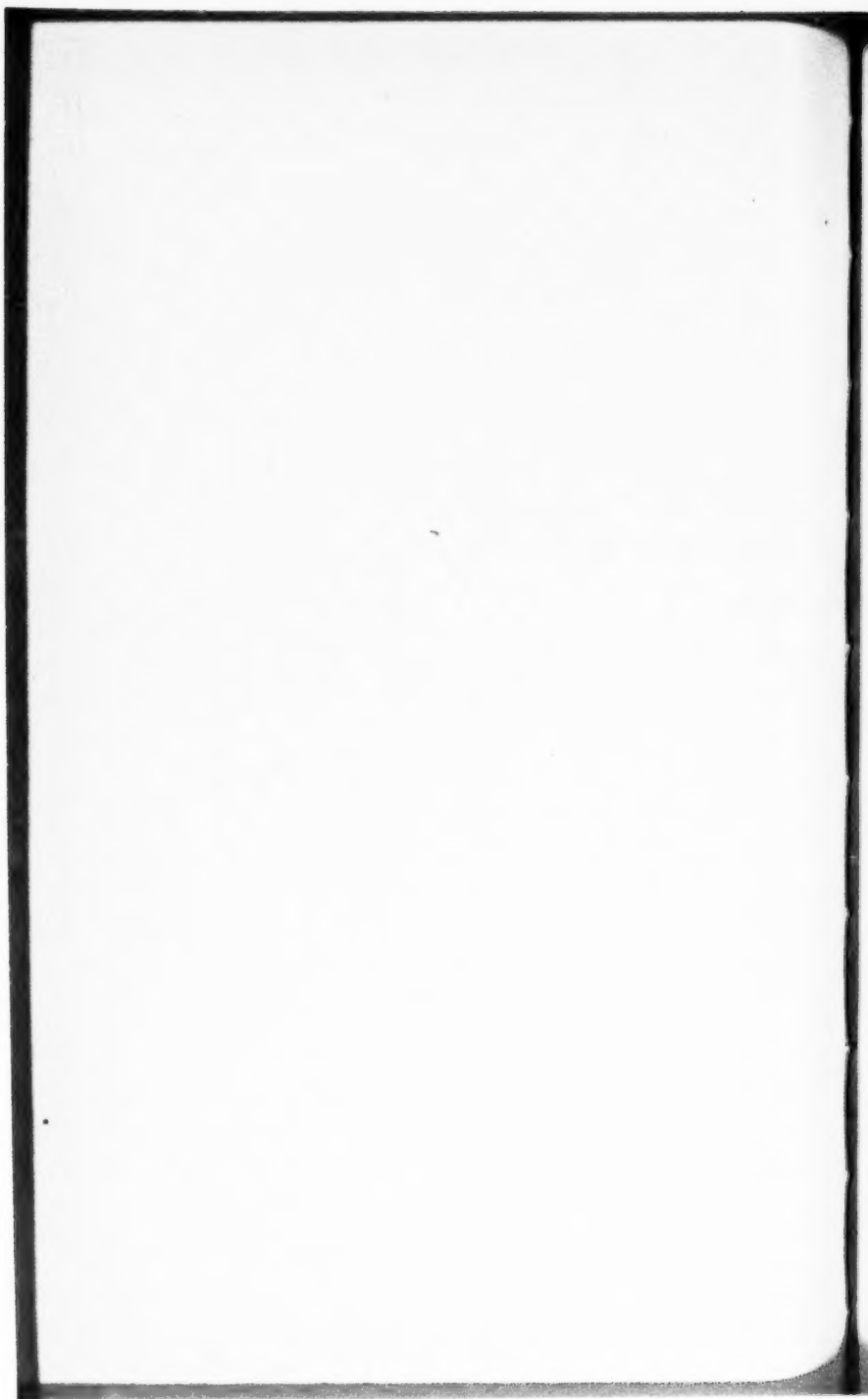
---

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE.

---

C. R. HILLYER,  
*Attorney for John W. Eshel-*  
*man & Sons.*

Illinois Merchants Bank Building.  
CHICAGO, April 5, 1924.



IN THE  
**Supreme Court of the United States.**

OCTOBER TERM, 1923.

No. 333.

---

UNITED STATES

*vs.*

PENNSYLVANIA RAILROAD COMPANY.

---

MOTION FOR LEAVE TO APPEAR AS AMICUS  
CURIAE.

---

*To the Honorable Chief Justice of the United States and  
the Associate Justices of the Supreme Court of the  
United States:*

Now comes C. R. Hillyer of Chicago, Illinois, attorney  
and counsel for John W. Eshelman & Sons, and presents  
his motion for leave to appear in the above entitled  
case as *amicus curiae*, and to file brief and present argu-  
ment as such, in support of the decree entered in the  
above entitled proceeding by the United States District  
Court for the Middle District of Pennsylvania, and in  
support of said motion shows as follows:

John W. Eshelman & Sons, hereinafter called the in-  
dustry, is a corporation organized and existing under the  
laws of the State of Pennsylvania, and is engaged in the  
manufacture of mixed live stock and poultry feeds in  
the City of York, Pennsylvania.

The industry has a more direct and vital interest than any other party affected by the order of the Interstate Commerce Commission in *Manufacturers Association of York* (73 I. C. C. 40), directing the railroad companies serving York, Pennsylvania, to either extend their switching facilities to all shippers and receivers of freight at York similarly situated, or withdraw such facilities from those industries in York now served by such facilities.

The plant of the industry at York, Pennsylvania, is located within the zone wherein the trackage arrangement existed and exists between the Pennsylvania Railroad Company and the Western Maryland Railroad Company.

That a compliance with the alternative order of the Interstate Commerce Commission by the withdrawal of the existing trackage agreement would result in irreparable damage to the industry because of the fact that its operations are entirely dependent upon a transit practice peculiar to the feed business.

That under said practice the industry is receiving a large tonnage of interstate traffic consisting of several thousand carloads annually of raw materials into its plant at York. That after manufacture into mixed feeds the product is shipped out to consuming points upon said transit practice whereby the through rate from point of origin of the raw material to the final destination of the product manufactured at York in transit is assessed.

That the continuation of said transit practice and the basis of freight rates assessed thereunder depends absolutely upon the continued existence of the present trackage arrangement between said railroad companies whereby the plant of the industry is thereby in fact

located upon both railroads. If said trackage arrangement is canceled in compliance with the alternative order of the Commission, the plant of the industry at York will then cease to be located upon the rails of the Pennsylvania Railroad Company and will be located only upon the rails of the Western Maryland Railroad Company. That ninety-nine per cent of the sources of supply of the industry's raw material, and practically all of its markets of consumption of its products are served exclusively by the Pennsylvania Railroad Company, and unless its plant remains in fact upon the rails of said company the transit practice via the lines of said company can no longer operate and its investment of over \$300,000 in its York plant and its going business developed at great effort and heavy cost will be totally ruined.

There is no other shipper in York receiving and shipping as many carloads of traffic as does the industry. There is no other industry in York operating upon a transit practice. The cancellation of the present trackage arrangement will result necessarily in the assessing of switching charges in addition to the rate wherever shipments via one line must be delivered or originated by the other. Moreover said cancellation will necessarily result in preventing a through movement via York upon a transit practice of the industry's shipments over the rails of the Pennsylvania Railroad Company. As a necessary result thereof the freight charges on shipments to and from the industry will be the combination of rates assessed upon York.

The mixed feed business is commercially built upon very small profits of approximately \$10 per carload and therefore the industry could not continue in business upon any other basis than that of a transit practice as described. The payment of even a very small switching charge into and out of its plant would wipe out whatever

small margin of profit there is now in the business. The payment of the combination of rates upon York is obviously commercially impossible in the industry's business.

The foregoing brief description of the industry's interest in the alternative order here in issue discloses the peculiar situation confronting the industry which situation is not shared by any other shipper located at York and affected by said order of the Commission.

The industry being a member of complainant association and having a more vital, direct and special interest than any other party affected by the order of the Commission, petitioner earnestly prays for the granting of this petition in order that he may more fully set out for consideration in brief and argument the extreme seriousness of the situation confronting the industry by reason of said order of the Commission.

Immediately upon notice of the order entered petitioner for the industry filed a petition for reopening and reconsideration of said order by the Commission. Moreover, petitioner for the industry has formally intervened in the collateral proceedings now pending in the United States District Court for the Middle District of Pennsylvania involving an injunction entered in 1909 by said court preventing the cancellation of the track-age arrangement existing at York.

In other words, the industry has been alert to protect itself ever since it was placed in jeopardy by the alternative order of the Commission. The industry was and is a member of the York Manufacturers' Association which filed the complaint upon which the order of the Commission here under review was entered and is therefore fully advised as to the nature of that proceeding, and is a proper party of direct interest in the instant

proceeding. The said order of the Commission took the industry completely by surprise because it was not based upon the pleadings and the record before the Commission and is therefore illegal as will be fully pointed out by petitioner.

WHEREFORE prayer is made that this Honorable Court will enter an order permitting C. R. Hillyer to appear as *amicus curiae* in the above entitled proceeding for the purposes stated above.

C. R. HILLYER.

BRIEF AND ARGUMENT AS *AMICUS CURIAE*.

After the filing of complaint before the Commission in the proceeding which resulted in the order of the Commission herein under attack, and before the date of the Commission's decision therein, reported in *Manufacturers Association of York*, 73 I. C. C. 40, John W. Eshelman & Sons, hereinafter called the industry, expended a large sum of money in establishing a new plant at York, which is located within the so-called "zone" where the trackage arrangement existed and exists between the lines of the Pennsylvania Railroad and the Western Maryland Railroad, as explained in detail in the Commission's report.

That while the industry knew, at the time of the establishment of this plant, of the institution of this proceeding before the Commission it took no individual part in the presentation of the case for the following reasons: according to the industry's interpretation of the complaint, the only affirmative relief sought by the Manufacturers Association of York was the extension of the trackage zone; the industry therefore had no reason to believe that any order which the Commission might enter as the result of this proceeding would result in financial loss to the industry.

The order of the Commission, requiring defendants in the alternative to remove the undue prejudice found in the Commission's report, was first entered to become effective November 6, 1922. The effective date of the order has been postponed indefinitely. The petition for postponement was based on information which came to members of the Manufacturers Association that the Pennsylvania Railroad Company intended and still in-



tends to comply with the Commission's order by canceling the present trackage arrangement within the contract zone, and not by extending the zone in the manner sought by complainant in said proceeding.

At page 49 of its opinion the Commission refers to the existence of an alternative order entered by the Pennsylvania State Commission requiring the removal of discrimination between shippers at York and the existence of an injunction of the United States District Court for the Middle District of Pennsylvania prohibiting the railroads from complying with said order by withdrawing the trackage arrangement entirely as they attempted to do.

Since the alternative order in the instant case was entered as to interstate business, the Pennsylvania Railroad Company has petitioned said court to now set aside its injunction which was granted in 1909, so that it will be free to carry out both state and interstate orders by wiping out entirely the existing trackage arrangement.

The industry receives and is receiving a large tonnage of raw materials inbound and is shipping a substantial tonnage of its manufactured stock feed outbound to and from various interstate points and from and to various points in the United States upon a transit practice whereby the through rate from point of origin of the raw material to the final destination of the finished product manufactured in transit at York is assessed. The value of its raw materials and its finished products is extremely low; that of the finished products averaging about \$40 per ton. The additional charges which would result from the cancellation of the present trackage arrangements made up of the switching charges at York plus the local inbound and outbound rates would be prohibitive of the industry's business because such additional

charges would be in amount several hundred per cent of the total profits of the industry on a carload of feed.

If the Pennsylvania Railroad Company should cancel the existing trackage arrangement, as would be possible under said alternative order of the Commission, the industry's plant would then be located solely upon the rails of the Western Maryland Railroad Company. The transit practice of the latter company is inoperative at the plant of the industry because the rails of said company are but the stub end of a branch line stopping at York. There is therefore no through transit possible at said plant via the Western Maryland, and the back-haul charges to get into the channel of traffic on said line of railroad consume more than the profits in the business. The existence and enforcement of the alternative order of the Commission therefore constitutes a serious menace to the investment and going business of the industry.

If the order of the Commission is not suspended and withdrawn and if the railroad companies pursue their lawful rights under said alternative order by canceling the trackage arrangement within the zone the industry must and will be compelled to close its plant. This will result in the loss of practically its entire investment of over \$300,000 in the York plant and in addition the entire loss of its business which it has developed at great cost. The defendant carriers would lose approximately \$1,000,000 in freight revenue per year from the loss of the tonnage handled to and from the York plant of the industry.

Unless the order of the Commission is further suspended, or annulled, irreparable damage and financial loss and injury will be incurred by the industry. The

above statement shows the vital individual interest which the industry has in this proceeding.

It is well within the facts to state that there is no individual industry in York that will suffer such overwhelming loss and confiscation of its property as will this industry under the compliance with the Commission's alternative order in the manner left open by the alternative order as the lawful right of the carriers.

Petitioner presents for consideration the following subjects.

(a) The order of the Commission is based upon a misconception of the issues presented to it in the complaint instituting the proceeding.

(b) The order of the Commission goes beyond the prayers of complaint for relief and is therefore without legal foundation.

(c) The complainant in the proceeding before the Commission specifically requested the Commission not to enter such an order as was in fact entered.

(d) That the conclusions of the Commission are unsupported by the evidence in that there is no industry in York without the so-called zone similar to, or which competes with the industry, and there is therefore no basis for the general finding of undue prejudice. There are no facts of record or in the Commission's report which will support the said finding of undue prejudice in so far as the industry is concerned. No one has ever complained of undue preference of the industry.

**THE COMMISSION MISCONCEIVED THE ISSUES AND PRAYER  
FOR RELIEF PRESENTED TO IT BY THE COMPLAINT FILED.**

---

The order of the Commission based on undue preference in favor of shippers whose plants are located within the trackage zone in the City of York, and undue prejudice of plants located outside of said zone is based upon a misconception of issues and goes beyond and outside of the prayers of complaint filed and is therefore without legal foundation.

In a case brought by formal complaint the Commission cannot lawfully go beyond the issues and prayers as presented. (See *Schlicher v. Director General*, 62 I. C. C. 181, at p. 185, and numerous cases there cited.)

"While it is not our policy," says the Commission, "to be unduly technical in the matter of pleadings . . . we are acting in a quasi-judicial capacity."

"Complainants have elected what issues they would raise for our determination; on those issues both complainants and defendant have been heard, and our decision should be based."

The order of the Commission herein took the industry completely by surprise. The shippers located outside the trackage zone brought no complaint of undue prejudice against the shippers (of which the industry was one) located within the trackage zone.

The complaint was brought by the Manufacturers' Association on behalf of all of its members both within as well as outside of the trackage zone, and it is inconceivable that in such joint collective complaint a portion of the association's membership should have therein complained against themselves. This is the position in which the Commission's report and order would inad-

vertently place complainant and the shippers within the trackage zone. This principle of law is elementary, that an action cannot be brought by a party against itself.

The complaint was brought by the principal shippers and receivers of freight as a unit and represents practically the City of York its suburbs and environs, for the good of all and the detriment of none, whereas the effect of the Commission's decision would be to disturb the switching conditions in York which are and have been most satisfactory and to leave untouched the conditions which, in the opinion of the association, were deemed in need of relief.

There was only one issue of undue prejudice under Section 3, Par. 1, of the act and that issue was stated in the Commission's report as follows:

"And that defendants' practices and rates resulting therefrom are unduly prejudicial to York and certain shippers therein and unduly preferential of other shippers and localities."

The "other shippers" referred to were the other shippers as a whole located in other localities or other cities, such as Baltimore, Cumberland, Hagerstown and Key-mar, Maryland. (See Complainant's Brief, page 34, under the title, "More Advantageous Switching Arrangements in Other Cities.") The Commission's order was not based upon undue prejudice against York in favor of other cities, which was the only issue of undue prejudice under Section 3 concerning which complainant's sought relief.

There can be no reasonable doubt of complainant's contention in this respect, as will be shown by reference to the Commission's report and to complainant's brief and exceptions. The Commission's report on page 41 itself states the prayer of the complaint as follows:

"It asks us not only to remove the alleged undue

prejudice (between York and other cities) but to place all shippers within the City of York on an exact equality by requiring either interchange at that point, reciprocal switching, the use by one carrier of the terminals of the others, or the publication of joint rates on York basis to and from all industries wherever located."

The following extracts bearing out this contention are taken from complainant's brief:

"This complaint is filed by the manufacturers of York, Pennsylvania, to recover for York the reciprocal switching service it enjoyed under Federal control." (Page 1.)

"From the very beginning of Federal control as regards coal, and from February 1, 1918, as regards other traffic, cars were interchanged at York and the service of reciprocal switching to re-establish which is the purpose of this proceeding, was general throughout York." (Page 10.)

"One is to extend the method of operating now practiced in the 'favored zone,' viz., the trackage arrangement, to the rest of York. The other is to extend the method of operating now practiced between the Pennsylvania and the Maryland & Pennsylvania, viz., the interchange arrangement, to the rest of York. The prayer of the complainants is for the application of both of these measures of relief." (Page 52.)

Therefore, complainant did not seek such an order as was entered by the Commission. Said order greatly jeopardizes the interests of the City of York as a whole and of the industry more than any other interest involved. It is repugnant to sound reasoning to assume that any such order was asked for or contemplated. The pleadings do not support the order and said order is therefore illegal.

**THE COMPLAINANT SPECIFICALLY REQUESTED COMMISSION TO MAKE NO SUCH ORDER AS WAS ENTERED.**

---

The effect of an order such as that entered by the Commission was forecast in complainant's brief and exceptions and the Commission was asked not to enter such an order.

"To cancel the trackage arrangement would only increase the discrimination against the Western Maryland and in favor of the Maryland & Pennsylvania. If the arrangement with the Maryland & Pennsylvania were also canceled, such a closing tight of all York's terminals would only make more intolerable the violation of the duty to provide transportation, to establish through routes, and to afford all reasonable facilities for the interchange of traffic, at the same time that it would increase the discrimination against York and in favor of other nearby cities." (Brief, pages 89-90.)

"If the order in this case for the removal of the undue prejudice (as proposed by the Examiner) were made in the alternative and the Pennsylvania undertook to remove the undue prejudice by abrogating its trackage arrangement with the Western Maryland and by abolishing the interchange with the Maryland & Pennsylvania at York, precisely the same situation would arise as arose in the case cited; that is, there would be more violations of the act in York than there ever were. \* \* \* Moreover, such action would only increase the discrimination against York as compared with other cities." (See Complainants' Exceptions, pp. 23, 24.)

The entering of the alternative order herein places complainant absolutely at the mercy of the defendants and as long as it is in effect the commercial interests of York, of which the industry is an important integral factor, are uncertain as to the continued existence of their business, with all the demoralizing and deadening effect of such dire uncertainty.

**NO VIOLATION OF SECTION 3 ALLEGED OR SHOWN AS TO  
THE INDUSTRY.**

---

There is no shipper in York or its vicinity manufacturing the same or similar products (stock feeds) or which is in competition with the industry in the purchase of raw materials or the sale of its products. Therefore there is no basis for the finding of undue preference in favor of the industry under Section 3 of the statute, or undue prejudice of any one located outside of the trackage zone in competition with the industry.

Moreover, no such preference or prejudice was alleged or shown upon the record before the Commission.

Furthermore, petitioner avers that there are no industries located outside of the zone complaining of undue prejudice in favor of any competitors located within the zone or who desire that the alternative order of the Commission should become effective. Therefore there is no basis for the finding of undue prejudice.

Petitioner further avers that the illustration cited as typical in the Commission's report of the York Body Corporation and the Martin-Parry Corporation, and which formed the basis of the Section 3 finding, is not typical, but is extreme, and is practically the only instance where an industry outside of the trackage zone actively competes and ships in competition with an industry manufacturing like articles within the zone. Furthermore, petitioner avers that the Martin-Parry Corporation does not seek and has not sought any order of the Commission which would enable defendants to change the rates and switching facilities which its competitor within the zone now enjoys.



**CONCLUSION.**

Petitioner has hereinbefore set out to the Commission the pertinent facts bearing directly upon the jeopardy in which the industry now finds itself due to the existence of the said alternative order of the Commission. Petitioner has also shown that there is no legal restraint now existing upon the Pennsylvania Railroad as to the method or manner in which it shall comply with the Commission's order.

Petitioner has pointed out that said alternative order is in nowise supported by the pleadings or prayers for relief of the complainant. Petitioner has pointed out that said alternative order and finding of the Commission is opposed by many parties to the case including defendants, complainant's members, and the industry.

Petitioner therefor avers that unless the order of the Commission is enjoined the industry will be subjected to irreparable damage and financial loss and injury amounting to the confiscation of its plant investment of over \$300,000 and its valuable going business. Petitioner has pointed out that the industry is the largest receiver of tonnage in York that will be affected by the order of the Commission, and that it will be completely wiped out by the cancellation of the trackage arrangement due to the operation of the transit practice as described. That said results to the industry will violate the provisions of the Fifth Amendment to the Constitution of the United States prohibiting the deprivation of life, liberty or property without due process of law.

For the reasons set forth above we believe the order of the Commission is illegal and should be permanently enjoined.

Respectfully submitted,

C. R. HILLYER,

*Attorney for John W. Eshelman & Sons.*

Illinois Merchants

Bank Building, Chicago.

April 5, 1924.

End.